No. 1125.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MATT MEEHAN and THOMAS LARSON,

Appellants,

v.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Respondents.

RESPONDENTS' BRIEF.

H. J. MILLER,
Attorney for Respondents.

T. C. WEST,
of Counsel.

Pernau Press.

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RESPONDENTS' BRIEF.

The statement of the case contained in the brief of the appellants is correct.

The appellants set out eleven assignments of error as shown by the Transcript of Record, at page 166 thereof, but abandon all of these with the exception

of five, namely, the first, third, fifth, seventh and eighth, as shown in appellants' brief, at page 2 thereof.

The writer will endeavor to take up the specifications of error relied upon by appellants, in the order in which they discussed them.

I.

"That the Court erred in finding that the plaintiffs " performed all the conditions of their agreement."

This seems to be the point most relied upon by counsel for appellants.

The agreement between the parties is set out *in haec verba,* at page 11 of the Transcript of Record. The condition on the part of the respondents to be performed was the sinking of three holes to bed-rock. The question, therefore, is a very narrow one that this Court is called upon to determine.

Is there any evidence at all, upon which the lower court could base its conclusion, that the respondents had performed the condition required of them?

Where there is any testimony whatever consistent with the finding, or where there is a conflict of evidence, or a question of the credibility of witnesses, the conclusion of the Court below will be treated as unassailable, no matter how ingenious or convincing the argument may be that, upon the evidence, the

findings should have been different, and the finding of the Court below will not be disturbed where there is any evidence whatever upon which such findings could be made. As to this point, the writer desires to refer to the same cases cited by Counsel for appellants, at page 3 of their brief, namely:

Davis v. Schwartz, 155 U. S. 636;
Dooley v. Pease, 180 U. S. 132;
Hathaway v. Bank, 134 U. S. 498;
Rankle v. Burnham, 138 U. S. 226;
MacIntosh v. Price, 121 Fed. Rep. 716;
Eureka County Bank v. Clarke, 130 Fed. Rep. 327;
Last Chance Mg. Co. v. Bunker Hill Co., 130 Fed. Rep. 587.

Also, and particularly:

Stanley v. Albany Co. Supers., 121 U. S. 547;
Gates v. Andrews, 97 Amer. Dec. 764;
Wilson v. Rybolt, 79 Amer. Dec. 486;
Bohannon v. Combs, 10 Amer. St. Repts. 328.

The Appellate Court will never weigh evidence for the mere purpose of determining the preponderance, and controverted questions of fact will not be reconsidered on appeal.

Isler v. Bland, 117 Ind. 457;
Chicago etc. Ry. Co. v. West, 125 Ill. 320.

The law, therefore, being clear on this point what is the evidence upon which the trial Court based its finding?

See evidence of O. A. Nelson, page 19 of Transcript.

"Q. Did you do anything under that arrange-
"ment in the way of carrying out the agreement?"
"A. I fulfilled the contract."

Also, evidence of W. H. Woolridge, pages 31, 32, 33, 34, and 38, of Transcript.

See also, evidence of George Steelsmith, pages 50, 51, 53 and 54, of the Transcript.

See also evidence of Oscar Gibbs, pages 58, 59, 60, 61 and 62, of the Transcript, and of W. G. Crabbe, at pages 69, 70, and 71, of the Transcript, also of George Ashenfelter, page 74 of the Transcript.

The witness James McPike testifies to the same facts, see pages 78 and 79 of the Transcript.

See also, evidence of O. A. Nelson, re-called, page 80, of the Transcript.

There is also evidence, that the appellant Larson, admitted that the respondents had sunk these holes to bedrock and fully performed their part of the agreement. As to this, see evidence of H. J. Miller, at page 84, of the Transcript.

Turning to the evidence of the respondent Lar-

son, at page 86 of the Transcript, he swears, referring to hole number one, "that hole went to bedrock".

Again speaking of hole number two, and judging from indications of the dump around it, he says, " it didn't show any bedrock on the surface", and of the third hole, " I should judge it went through " the muck".

There was no reason why the dump should show any indications of whether or not the holes went to bedrock. There was no agreement on the part of respondents to go *into* bedrock, or to excavate any of it, the agreement reads, "In consideration of " sinking these holes *to* bedrock, etc". This also was the clear understanding of the respondent Larson, even if the agreement was less clear on that point, for in his evidence, at page 85 of the Transcript, when, upon being asked if he was one of the parties to the agreement made with Nelson and Hensley, and replying in the affirmative, he was next asked the question, "about sinking 3 holes on " these claims?", he gave the answer, "Yes, to bed- " rock".

The evidence of the respondent Larson shows that he did not visit the holes in question until some five months after they had been sunk and at the time of his visit they (very naturally), had caved in.

It is claimed by counsel for the appellants, at

pages 8 and 9 of their brief, that the testimony of Boos, Zeimer and others conflicts with that of the respondents, but, if that is the case, which the respondents do not admit but on the contrary deny, the appellants bring themselves within the rule of law that where there is a conflict of evidence the decision of the trial Court will under no circumstances be disturbed for the reasons and under the authorities above cited.

The Court below having had ample evidence before it upon which to base its findings, it is submitted, that the other questions raised by counsel for the appellants are purely academic and call for an answer merely because of the great learning and standing at the bar of the counsel raising them.

When the facts found sustain the judgment, it is not necessary to go further and find upon other issues:

Malone v. Co. of Del Norte, 77 Cal. 217.

II.

That the Court erred in finding that the defendants, after the completion of the sinking of the three holes by plaintiffs, without inspecting the work, promised plaintiffs to make a conveyance, but neglected to examine and inspect the work until it was impossible to do so by reason of said holes having caved in and filled with water.

This again is a question of fact that the Court below resolved in favor of the respondents and to which the authorities above mentioned equally apply.

There is ample evidence that the appellants promised to make the conveyance and also that they neglected to examine and inspect the work until it was impossible to do so by reason of the fact that the sides had sluffed in and the holes were filled with water.

As to this see the evidence of the appellant Larson who swears that he did not examine the holes until July.

III.

That the Court erred in its conclusion of law that the plaintiffs performed all of the conditions of their agreement.

It would seem elemental that if the Court found as a fact that the respondents had performed all the conditions of the agreement that it would be justified in finding the same conclusion of law.

IV.

It is submitted that the findings of the Court below with regard to the 4th and 5th specifications of error relied upon by counsel for the appellants flow as a natural consequence from the findings of facts referred to.

Lastly, the learned counsel complain that a study of the record makes it manifest that the case which it presents does not appeal to the favorable discretion of the Court.

Courts, of course, will not set aside an agreement merely upon the ground that a bad bargain has been made, but in this case a bad bargain even is not shown to have been made, as anyone familiar with mining matters in Alaska, as the learned Judge of the Court below undoubtedly is, well knows. The conditions of mining are different there than anywhere else in the world and this fact being known and considered by the trial Judge, it is submitted, is perhaps one of the greatest reasons why his findings on questions of fact should not be disturbed.

It is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

H. J. Miller,

Attorney for Respondents.

T. C. West,

of Counsel.